

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 10AP-302
Plaintiff-Appellee,	:	(C.P.C. No. 09CR-09-5750)
v.	:	
	:	(REGULAR CALENDAR)
Harry W. Anderson, Jr.,	:	
	:	
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on November 16, 2010

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*Ron O'Brien*, Prosecuting Attorney, and *Kimberly M. Bond*, for appellee.

*Yeura R. Venters*, Public Defender, and *John W. Keeling*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Defendant-appellant, Harry W. Anderson, Jr. ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas convicting him of felonious assault, a second-degree felony, in violation of R.C. 2903.11.

{¶2} Appellant's conviction arises out of the September 15, 2009 stabbing of 61-year-old Arthur Hutchins ("Hutchins"). According to Hutchins, he moved to Columbus when he was a child to live with his aunt and throughout his life has been to prison multiple times for convictions that extend back to the 1960's. Hutchins testified that in June 2009, he and his brother, Lester Gullatt ("Lester"), moved to an apartment at 827

South James Road in Columbus, Ohio. Hutchins testified to the jury that on September 15, 2009, he was sitting outside on his front steps, and also outside was his neighbor from the apartment upstairs, Melissa Bartholow ("Melissa"), and her little boy. According to Hutchins, appellant, who appeared intoxicated, approached Melissa and began talking to her, but Melissa went inside the building. Hutchins testified that appellant remained outside after Melissa entered the building, and as Hutchins got up to go inside the building, appellant pulled out a knife, stabbed him in the stomach, and took his cane.

{¶3} Lester called 911 and, during the call, Hutchins also spoke with the dispatcher. In response to the inquiry of who stabbed him, Hutchins told the dispatcher that he did not know the man's name but knew he was a man who has a brother that "stay down the street." (Tr. 43.) Hutchins also described to the dispatcher that the man who stabbed him was wearing blue sweatpants and a baseball cap.

{¶4} Medics arrived, and Hutchins was transported to the hospital, where he remained hospitalized until October 14, 2009. Though Hutchins was not able to identify appellant in a photo array shown to him the day following the stabbing, Hutchins testified that appellant was the same man who was trying to talk to Melissa on September 15, 2009 and was the same man who stabbed him.

{¶5} Melissa testified that on September 15, 2009, she and her son were walking back to their apartment at 827 South James Road when a man sitting on the steps of 797 South James Road, tried to talk to her. According to Melissa, the man was saying things to the effect that she "need a man" because she did not "have a man to put food on the table" and that "he could do all that." (Tr. 71-73.) Melissa testified that the man started to get angry because she would not talk to him, and he then followed her to her building

where Hutchins was sitting outside. Melissa testified that she gave Hutchins a cigarette and then went inside the building to get her son's bicycle. Within minutes, Melissa heard a woman say, "Somebody got stabbed." (Tr. 77.) Melissa testified that, as she was giving a statement to the police, they were alerted that a person was in the dumpster. The person in the dumpster was appellant, and Melissa identified him to police as the man that followed her down the street. Melissa testified that she was "100 percent" sure that, though she did not know his name, appellant was the person who was known to stay with his brother at 797 South James Road and was the person who followed her down the street and was outside with Hutchins just prior to him being stabbed.

{¶6} Columbus Police Detective Todd Cress responded to the stabbing and met appellant's brother, Marvin Anderson, at 797 South James Road. Detective Cress testified that neither a knife nor cane was recovered from the scene, but a pocketknife was found in Marvin's sock. Because there was no blood on the pocketknife, it was not submitted for testing. Detective Cress further described that, as he was talking to Melissa, they were informed of a person sleeping in the dumpster that was full of trash and broken glass. Appellant, who was wearing light blue jogging pants with white stripes down the side, was discovered. Detective Cress testified that, during an interview the day after the stabbing, though Hutchins was not able to identify appellant in a photo array, he told Detective Cress that he was stabbed by "Marvin's brother, but did not know his name." (Tr. 95.)

{¶7} On September 24, 2009, a Franklin County Grand Jury indicted appellant on one count of aggravated robbery, in violation of R.C. 2911.01, two counts of robbery, in violation of R.C. 2911.02, and one count of felonious assault, in violation of R.C.

2903.11. Three of the counts contained a repeat violent offender ("RVO") specification. A jury trial commenced on February 8, 2010. At the conclusion of the state's case, one of the robbery counts was dismissed. On February 11, 2010, the jury found appellant guilty of felonious assault and not guilty of the remaining charges. The RVO specification was dismissed, and a pre-sentence investigation ("PSI") was ordered. On February 22, 2010, a sentencing hearing was held, and appellant was sentenced to a seven-year term of incarceration and awarded 158 days of jail-time credit.

{¶8} This appeal followed, and appellant brings the following assignment of error for our review:

THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE DEFENDANT ON THE CHARGE OF FELONIOUS ASSAULT WHEN THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTION AND THE CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE WHEN THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT INFLICTED THE INJURIES UPON THE COMPLAINANT.

{¶9} In this assignment of error, defendant challenges the sufficiency and weight of the evidence supporting his conviction. When reviewing the sufficiency of the evidence, an appellate court must:

[E]xamine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

*State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶10} This test raises a question of law and does not allow the court to weigh the evidence. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52; *State v. Thomas* (1982), 70 Ohio St.2d 79, 80. Rather, the sufficiency of the evidence test "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789. Consequently, when reviewing the sufficiency of the evidence, an appellate court must accept the fact finder's determination with regard to the credibility of the witnesses. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79; *State v. Worrell*, 10th Dist. No. 04AP-410, 2005-Ohio-1521, ¶41 ("In determining whether a conviction is based on sufficient evidence, we do not assess whether the evidence is to be believed, but, whether, if believed, the evidence against a defendant would support a conviction.").

{¶11} As opposed to the concept of sufficiency of the evidence, "[t]he weight of the evidence concerns the inclination of the greater amount of credible evidence offered in a trial to support one side of the issue rather than the other." *State v. Brindley*, 10th Dist. No. 01AP-926, 2002-Ohio-2425, ¶16, citation omitted. In order for a court of appeals to reverse the judgment of a trial court on the basis that the verdict is against the manifest weight of the evidence, the appellate court must disagree with the fact finder's resolution of the conflicting testimony. *Thompkins* at 387. The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised

only in the exceptional case in which the evidence weighs heavily against the conviction. Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶12} A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21. The determination of weight and credibility of the evidence is for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230. The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor and determine whether the witnesses' testimony is credible. *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶58; *State v. Clarke* (Sept. 25, 2001), 10th Dist. No. 01AP-194. The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Jackson*, 10th Dist. No. 01AP-973, 2002-Ohio-1257; *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C000553. Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must give great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶22; *State v. Hairston*, 10th Dist. No. 01AP-1393, 2002-Ohio-4491, ¶17.

{¶13} Appellant was convicted of felonious assault in violation of R.C. 2903.11(A)(1), which provides that "[n]o person shall knowingly \* \* \* [c]ause serious physical harm to another or another's unborn." According to R.C. 2901.22(B), "[a] person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." Additionally, a

defendant acts knowingly, when, although not intending the result, he or she is nevertheless aware that the result will probably occur. *State v. Edwards* (1992), 83 Ohio App.3d 357, 361. Therefore, felonious assault under R.C. 2903.11(A), combined with the definition of "knowingly" found in R.C. 2901.22(B), does not require that a defendant intend to cause "serious physical harm," but that the defendant acts with an awareness that the conduct probably will cause such harm. *State v. Lee* (Sept. 3, 1998), 10th Dist. No. 97APA12-1629.

{¶14} The basis for appellant's assigned error is that Hutchins's testimony is not credible. Appellant argues that Hutchins has led a hard life, has an unreliable memory as demonstrated in his inability to identify appellant in a photo array, and has provided no motive for appellant to have stabbed him. Initially, we note that, while motive is generally relevant in criminal trials, the prosecution need not prove motive in order to secure a conviction. *State v. Curry* (1975), 43 Ohio St.2d 66, 70. Moreover, we do not weigh credibility when considering an insufficiency of the evidence argument. Rather, the test is whether the evidence viewed in a light most favorable to the prosecution, if believed, would convince a rational trier of fact that appellant was guilty of felonious assault.

{¶15} Hutchins suffered a serious stab wound to his abdomen that required him to be hospitalized from September 15 to October 14, 2009. Hutchins testified that the person who stabbed him was a black man wearing blue jogging pants and was outside of his apartment trying to talk to his neighbor Melissa. Hutchins recognized the man as Marvin Anderson's brother. Though not knowing his name and not selecting appellant from the photo array, Hutchins consistently averred to police and at trial that his attacker was the person outside who had been talking to Melissa and who he knew as Marvin

Anderson's brother. Additionally, Hutchins identified appellant in court as the man who stabbed him.

{¶16} Melissa also testified that appellant was the man who followed her to her apartment building and who was outside with Hutchins when she went into the building. Additionally, Melissa identified appellant at the scene, where he was found in a dumpster wearing blue jogging pants, as the man that followed her from the building where Marvin lived.

{¶17} From this evidence, a reasonable trier of fact could have found the elements of felonious assault satisfied beyond a reasonable doubt. Therefore, we find appellant's conviction is supported by sufficient evidence.

{¶18} We also find appellant's conviction is not against the manifest weight of the evidence. As previously stated, appellant's arguments here attack Hutchins's credibility. The jury, however, was in the best position to determine the credibility of Hutchins after hearing his testimony and observing his demeanor on the witness stand. *State v. Crisp*, 10th Dist. No. 06AP-146, 2006-Ohio-5041, ¶13.

{¶19} The jury was aware of Hutchins's past as he testified about his prior convictions and time spent in prison. Additionally, the jury was aware from the testimony that Hutchins did not select appellant from the photo array shown to him the day after the stabbing. A conviction, however, is " 'not against the manifest weight of the evidence simply because the jury believed the prosecution testimony.' " *State v. Moore*, 2d Dist. No. 20005, 2004-Ohio-3398, quoting *State v. Gilliam* (Aug. 12, 1998), 9th Dist. No. 97CA006757. The weight to be given to the evidence and the credibility of the witnesses are issues primarily for the trier of fact, and the jury is free to believe *all*, or *any* of the



testimony. *Jackson*, supra. Thus, the fact that the jury may or may not have found all of a particular witness's testimony to be credible is not a basis for reversal on manifest weight grounds. After carefully reviewing the trial court's record in its entirety, we conclude that the jury did not lose its way in resolving credibility determinations, nor did the conviction create a manifest miscarriage of justice. The jury was in the best position to determine the credibility of the testimony presented, and we decline to substitute our judgment for that of the trier of fact. Consequently, we cannot say that appellant's conviction is against the manifest weight of the evidence.

{¶20} For the foregoing reasons, appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

*Judgment affirmed.*

SADLER and CONNOR, JJ., concur.

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